Petition

81-881

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IN THE

Supreme Court of the United States

October Term, 1981

No.———

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILWAY COMPANY,

Petitioner,

vs.

WILLIAM E. LEER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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QUESTION PRESENTED

Does the Minnesota Supreme Court's ruling in *Leer v. Chicago, Milwaukee, St. Paul and Pacific Railway Company* abrogating a corporation's right to assert the attorney-client privilege violate the equal protection and due process provisions of the United States Constitution?

LIST OF ALL PARTIES

All the parties to the proceeding in the Minnesota Supreme Court are indicated in the caption to petitioner's application for a writ of certiorari. Petitioner's parent company is the Chicago, Milwaukee Corporation. The Chicago Union Station Company, Indiana Harbor Belt Railway Company, Kansas City Terminal Railway Company, Minnesota Transfer Railway Company, Pullman Company, Trailer Train Company, Longview Switching Company, and the Delta Alaska Terminal, Ltd. constitute petitioner's affiliates. Petitioner's subsidiary companies are the Des Moines Union Railway Company, Minneapolis Eastern Railway Company, Chicago Terre Haute & Southeastern Railway Company and the Davenport, Rock Island & North Western Railway Company.

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CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILWAY COMPANY,

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vs.

WILLIAM E. LEER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

Petitioner, Chicago, Milwaukee, St. Paul and Pacific Railway Company, respectfully prays that a Writ of Certiorari issue to review the opinion and orders of the Minnesota Supreme Court filed on July 17 and August 14, 1981.

OPINION BELOW

The opinion of the Minnesota Supreme Court is not yet reported. The July 17, 1981 slip opinion from that Court, and the Order denying petitioner's Petition for a rehearing, dated August 14, 1981, appear in the attached appendix.

JURISDICTIONAL GROUNDS

The opinion of the Minnesota Supreme Court was filed on July 17, 1981. A timely petition for rehearing was denied on August 14, 1981. The petition for a writ of certiorari was filed within 90 days of the Minnesota Supreme Court's Order denying petitioner's request for a rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

1. The relevant portion of the Fourteenth Amendment of the United States Constitution applicable to this case provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The Minnesota Rule of Civil Procedure relevant to this case is Minn. R. Civ. P. 26.02(3), which provides that, "Upon request, a person not a party, or a party, may obtain without the required showing a statement concerning the action or subject matter previously made by that person who is not a party."

STATEMENT OF THE CASE

Respondent William Leer seeks to recover damages as a result of an on-the-job injury sustained while he was a member of a switch crew working the Chicago, Milwaukee, St. Paul and Pacific Railway Company's railroad yard in Wausau, Wisconsin on September 20, 1978. Leer's claim was commenced pursuant to the Federal Employer's Lability Act, 45 U.S.C. § 51, *et seq.*, and is venued in the Minnesota District Court for Dakota County.

The other members of Leer's switch crew included Lyle Geurink (fireman), James Hack (conductor), Gary Klug (rear switchman) and Jessie Tomlinson (engineer). Although the facts of the accident are disputed, Leer was injured while performing a routine switching movement. Leer's Complaint alleges that the other members of the switch crew were negligent in the performance of their duties. He asserts that the co-employees' negligence was the direct cause of the accident, and his resulting injuries.

One of the railroad's claim agents obtained statements from Fireman Geurink, Conductor Hack, Rear Brakeman Klug and Engineer Tomlinson on September 20, 1978. These statements were obtained in anticipation of Leer bringing a claim against the railroad.

On June 22, 1979 Leer brought suit and served a Demand for Production of Statements. The railroad identified the Geurink, Hack, Klug and Tomlinson statements in its response, but refused to produce the statements, asserting the attorney-client privilege.

Leer's motion to compel discovery of the statements was heard by the Honorable Charles F. Gegen, Dakota County District Court Judge, on November 15, 1979. Leer contended that the statements were discoverable pursuant to Rule 26.02(3) of the Minnesota Rules of Civil Procedure for the District Courts. That rule provides:

> A party may obtain without the required showing a statement concerning the action or subject matter previously made by that party. *Upon request, a person not a party or a party, may obtain without the required showing, a statement concerning the action or its subject matter previously made by that person who is not a party.*

Id. (emphasis added).

Leer's central contention is that the statements of the four railroad employees are statements of a "non-party" and hence are discoverable as of right under Minn. R. Civ. P. 26.02(3). Leer argued to the trial court, and to the Minnesota Supreme Court, that since the four railroad employees that gave statements were not named as individual defendants in this suit, their statements are not protected by the attorney-client privilege.

As part of its argument before the trial court, the railroad contended that if the four statements were discoverable, then corporations would unlawfully be denied the same protections afforded by the attorney-client privilege to individual litigants. Although the literal language of the Fourteenth Amendment was not cited to the trial court, it is obvious that Judge Gegen's ruling was designed to avoid discrimination against corporations. Judge Gegen's Order stated. "[t]o hold otherwise would, in effect say, that there is no attorney-client privilege between a corporation and its attorneys." *See* App. at 19.

Leer appealed Judge Gegen's Order to the Minnesota Supreme Court. During oral arguments, and in its brief to the Minnesota Supreme Court, the railroad again timely and properly raised the argument that to permit discovery of the statements would deny corporations the same treatment and protection given individual litigants. Page 13 of the railroad's Minnesota Supreme Court brief states:

> To allow discovery of the four statements in question would deny the Milwaukee the same treatment and protection afforded by the attorney-client privilege to individual litigants.

The railroad also indicated at page 18 of its brief:

> This court can eliminate readily the confusion and unfairness that has arisen because of the inconsistency and ambiguity in the discovery rules as presently drafted, by providing to corporations the same protections and privileges as any other individual litigant.

Furthermore, after the United States Supreme Court released its opinion in *Upjohn Co. v. United States*, 101 S. Ct. 677 (1981), the railroad, in a separate letter brief, provided the Minnesota Supreme Court with a copy of the *Upjohn* decision, and argued that the United States Supreme Court's holding in *Upjohn* protected the statements from discovery.

Notwithstanding the fact that the railroad timely and properly raised its federal constitutional question, the Minnesota Supreme Court in its decision filed July 17, 1981 did not address any constitutional issues. Instead, that court held that:

> [W]hen an employee is merely a witness to an accident, and not a party to a subsequent action, communications made with them in a general investigation do not create an attorney-client relationship.

App. at 11.

In its petition for rehearing the railroad argued, *inter alia*:

> Under the language of the majority's slip opinion, the court has applied a death stroke to the attorney-client privilege in the corporate context. The privilege will cease to exist from this point on . . . . It would seem evident that corporations confronted with such

> uneven application of the law are being denied both due process under the law and an equal protection of that law as enjoyed by individual residents of this state.

Railroad Petition for Rehearing at 3. Without comment, the Minnesota Supreme Court denied the railroad's petition for rehearing by its Order dated August 14, 1981. *See* App. at 16.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With This Court's Recent Holding in *Upjohn Co. v. United States*, 101 S. Ct. 677 (1981), and is Thereby Violative of the United States Constitution.

The Minnesota Supreme Court clearly misapplied the United States Supreme Court's ruling in *Upjohn Co. v. United States*, 101 S. Ct. 677 (1981), by failing to hold that the *Upjohn* principles are dispositive of the attorney-client privilege issues raised in the instant case. The Minnesota Supreme Court attempted to distinguish *Upjohn* on the basis that:

> *Upjohn* is critically different from the instant case in that the communications in *Upjohn* regarded a matter within the scope of the employee's duties. In the instant case, the witnessing of an accident was not within the scope of the employees' duties.

App. at 11.

The written employee communications in *Upjohn* involved the extent of knowledge possessed by corporate employees about possible illegal payments made on behalf

of the corporation. Similarly, the witness statements in the instant case involve what the four railroad co-employees did, said and saw while employed by a corporation. Contrary to the Minnesota Supreme Court's statement that the four railroad employees merely *witnessed* the accident, it is undisputed that the four co-employees who gave statements, as in *Upjohn,* were active *participants* in an incident which would adversely affect their employer. The conduct of the employees in the railroad forms the basis of plaintiff's lawsuit. If the railroad is liable, it is due only to the fact that these particular employees were negligent, and that their negligence is imputed vicariously to their corporate employer.

Upjohn indicated that if employees whose statements are sought "can by actions within the scope of their employment, embroil the corporation in serious legal difficulties," *id.* at 683, then their statements are not discoverable. Because the United States Supreme Court in *Upjohn* specifically included "lower level" employees in this category, *id.*, the Minnesota Supreme Court's Order must be reversed. Any other result denies corporations the same rights as enjoyed by individuals, and violates both the due process and equal protection provisions of the Fourteenth Amendment of the United States Constitution.

While a state rule of civil procedure necessarily is being construed, the Minnesota Supreme Court's ruling has applied the death stroke to a privilege previously thought to apply equally to corporations as well as individuals. Elementary notions of equal protection and due process mandate that a rational basis exist for any discrimination between statements given by an individual, and statements obtained from corporate employees.

The absurdity and unconstitutionality of the Minnesota Supreme Court's decision is evident from the following hypothetical. Assume that an individual operates a sole proprietorship. While operating his truck in the course of business he accidently strikes a pedestrian. A statement is taken by a representative of the driver's attorney. Suit is brought against this individual and the statement demanded. The statement is not discoverable under Minnesota law because it is a statement of a party. However, if the individual's business is incorporated, and he had the accident in the course and scope of his employment, and only the corporation is sued, *Leer* requires that the statement be produced. Thus, corporations in Minnesota are not given the same protections as are individuals. Such disparate treatment is surely unconstitutional.

2. Courts Nationwide are Appying Inconsistent Standards in Determining the Scope of the Attorney-Client Privilege in a Corporate Setting. This Case Presents the United States Supreme Court with an Opportunity to Resolve an Issue of Nationwide Importance and Significance.

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. *See* 8 J. Wigmore, § 2290 (McNaughton rev. ed. 1961). The privilege certainly applies when the client is a corporation. *See United States v. Louisville and Nashville Railroad*, 236 U.S. 218, 336 (1915). Initially recognized by this Court in *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888), the importance of the privilege was again commented upon last term in *Trammel v. United States*, 445

U.S. 40 (1980). In *Trammel*, the Court indicated "[t]he attorney-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Id.* at 51. *Cf. Fisher v. United States*, 425 U.S. 391, 403 (1976) (purpose of the attorney-client privilege is "to encourage clients to make full disclosures to their attorneys").

Notwithstanding universal acknowledgement that the attorney-client privilege serves an important function in our legal system, there is little agreement as to the scope of the attorney-client privilege in a corporate setting. *See* Note, *Attorney-Client Privilege and Corporate Clients, the Control Group Test*, 84 Harv. L. Rev. 424, 432 (1970).

For example, in *Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa.), *petition for mandamus and prohibition denied sub nom. General Electric Co. v. Kirpatrick*, 312 F.2d 742 (3rd Cir. 1962), *cert. denied*, 372 U.S. 943 (1963), the court held that the attorney-client privilege did not apply unless the employee was seeking legal advice on behalf of the corporation To determine whether the employee was seeking legal advice on behalf of the corporation, the *Westinghouse* court advanced the "control group" test. Unless an employee is in a position to control or take a substantial part in a decision or is a member of a group having such authority, the attorney-client privilege is not applicable. Because "[t]he control group test . . . frustrates the very purpose of the privilege" it was specifically rejected by the *Upjohn* court. *See* 101 S. Ct at 684.

The Second Circuit Court of Appeals in *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970),

aff'd. per curiam by an equallly divided court, 400 U.S. 348 (1971), adopted "the subject matter test." Under that test a corporate employee's statement is discoverable only if the subject matter upon which a lawyer's advice is sought deals with a communication within the performance of the employee's duties. *Id.* at 491.

A third test, the "Weinstein test" was adopted by the Eighth Circuit Court of Appeals in *Diversified Industries v. Meredith, Inc.*, 572 F.2d 596 (1978). In that case the court adopted the suggestion of Judge Weinstein that the attorney-client privilege should be available to a corporation only if all of the following requirements are satisfied:

> (1) [T]he communication was made for the purpose of securing legal advice; (2) The employee making the communication did so at the direction of his corporate superior; (3) The superior made the request so that the corporation could secure legal advice; (4) The subject matter of the communication is within the scope of the employee's corporate duties; and (5) The communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Id. at 609. Although the *Decker* and *Meredith* cases were cited in *Upjohn*, neither test was adopted nor rejected by the United States Supreme Court.

The Minnesota Supreme Court's decision in *Leer* not only failed to adopt the *Upjohn* test, it held that a corporate employer has *no* right to invoke the attorney-client privilege regarding statements made by an employee. In Minnesota, unless the instant case is reversed, a corporate employee's statement is not protected, even if the employee's conduct results in the imposition of tort or criminal liabiilty against the corporation.

Courts nationwide continue to apply inconsistent standards in determining the scope of the attorney-client privilege in a corporate setting. At issue is not a hypothetical question of law. The bench and bar of this nation is in need of an opinion clarifying the parameters of the attorney-client privilege. However, even if this Court decides not to formulate a standard for determining the scope of the attorney-client privilege, it is clear that the instant case must still be reversed, because the Minnesota Supreme Court has totally and unconstitutionally abrogated a corporation's rights to assert the attorney-client privilege.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Minnesota Supreme Court. Alternatively, the Minnesota Supreme Court's decision in *Leer* should be vacated and reconsidered in light of *Upjohn*.

Respectfully submitted,

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APPENDIX

STATE OF MINNESOTA
OFFICE OF CLERK OF SUPREME COURT

ST. PAUL, MINN.

WILLIAM E. LEER,

Appellant,

vs. 50915

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILWAY COMPANY,

Respondent.

July 27, 1981

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

Application for reargument having been filed herein all further proceedings, except taxation of costs are stayed pending its determination.

Yours respectfully,

JOHN McCARTHY
Clerk Supreme Court

DAKOTA COUNTY

No. 348

WILLIAM E. LEER,

Appellant,

vs. 50915

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILWAY COMPANY,

Respondent.

Scott, J.
Concurring spec.
Simonett, J., and
Peterson, J.
Dissenting,
Otis, J.

Endorsed
Filed July 17, 1981
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

The attorney-client privilege does not encompass communications which are within an employee's knowledge solely because he witnessed an accident.

Reversed.

Heard, considered and decided by the court en banc.

OPINION

SCOTT, Justice.

The Dakota County District Court certified the following question to this court as important and doubtful:[1]

> Are witness statements obtained by a defendant from non-managerial employees who were working with plaintiff at the time of his accident discoverable by plaintiff under Rule 26.02(3), Minnesota Rules of Civil Procedure, or are the same protected from discovery under a claim of attorney-client privilege?

The appellant, William E. Leer, was employed by respondent railroad as a switchman in its Wausau, Wisconsin, railroad yards. Although the facts are incomplete and in dispute at this stage of the litigation, it appears that on September 20, 1978, appellant was in the process of executing a railroad car switching movement when he sustained an on-the-job injury. As a result, appellant's leg was amputated above the knee.

Appellant alleges in his complaint, based upon the Federal Employers' Liability Act (FELA), that the accident result from respondent's negligence, as follows:

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[1]Minn. R. Civ. App. P. 103.03 provides, in relevant part, as follows:

> An appeal may be taken to the Supreme Court:
>
> * * * *
>
> (i) If the trial court certifies that the question presented is important and doubtful, from an order which denies a motion to dismiss for failure to state a claim upon which relief can be granted or from an order which denies a motion for summary judgment.

This certification did not arise from either of these types of order. Therefore, this action is clearly not appealable as of right per Minn. R. Civ. App. P. 103.03(i). *See Price v. Amdal*, 256 N.W.2d 461 (Minn. 1977), *noted in* 4 Wm. Mitchell L. Rev. 245 (1978). However, we grant discretionary review pursuant to Minn. R. Civ. App. P. 105.

> [S]uch accident was caused by the defendant's negligence and failure to provide plaintiff with a reasonably safe place to work, failure to exercise reasonable care to provide plaintiff with a reasonably safe and efficient switch mechanism and by further reason of the defendant's negligence and carelessness by reason of its failure to exercise reasonable care in the execution of the switching movement then and there being carried out.

Appellant's action is against the respondent railroad. No members of the switching crew or other employees of the railroad are named as defendants. An investigator-employee of the railroad obtained statements of the other members of the switching crew on the day of the accident. Appellant served a demand for production of these statements upon respondent pursuant to Minn. R. Civ. P. 26.02(3) and 34.02,[2] along with the summons and complaint, on June 22, 1979. In respondent's reply to the request for production of documents, it identified the statements of four of its employees, but refused to produce them on the ground that the statements were protected by the attorney-client privilege.[3] The trial court ruled in favor

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[2]Minn. R. Civ. P. 26.02(3) provides in part:

> Upon request, a person not a party, or a party, may obtain without the required showing a statement concerning the action or its subject matter previously made by that person *who is not a partty*. (Emphasis added.)

Minn. R. Civ. P. 34.02 provides in part:

> The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any party with or after service of the summons and complaint upon that party.

[3]Minn. Stat. § 595.02(2) (1978) provides in part:

> An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given thereon in the course of professional duty * *' .

of respondent, and certified the above question.

The resolution of the certified question therefore depends upon:

(1) Whether the employees whose statements are the subject to this discovery procedure are parties under Minn. R. Civ. P. 26.02(3); and

(2) Whether, in any event, the attorney-client privilege constitutes a bar to discovery.

1. Appellant argues that since the employees were not named parties their statements are discoverable under Rule 26.02(3). The relevant part of this rule states that "[u]pon request, a person not a party, or a party, may obtain without the required showing a statement concerning the action or its subject matter previously made by *that person who is not a party*."[4] (Emphasis added.) The Advisory Committee note to Rule 26.02(3) makes clear "that a party, without the necessity of seeking a routine motion, has the right to obtain statements made by non-party witnesses."

Notwithstanding the fact that the employees were not named defendants, respondent argues that they are nonetheless parties since it is their negligence that appellant seeks to impute to respondent and since the employees could be named as parties at any time.

In Minnesota, it has been a longstanding rule of construction that words are to be given their ordinary meaning. *State v. Marsh*. 158 Minn. 111, 196 N.W. 930 (1924). The meaning of the word "party," when used in

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[4]The Minnesota rule differs from Rule 26(b)(3) of the Federal Rules of Civil Procedure with respect to witnesses' statements by providing for free discovery of any statements made by persons who are not parties to the litigation.

the legal sense, is clear: "party" means only the named plaintiff or defendant. *See* Black's Law Dictionary 1010 (5th ed. 1979). It would seem self-evident that a statement by an employee who is neither a named plaintiff nor a defendant is a statement of "a person who is not a party," and is therefore discoverable. In *Chappie v. SC (NEI), Inc.*, No. 711856 (Minn. 4th Dist. Ct., May 29, 1975), Judge Stone discussed this issue. He stated that:

> An agent or employee who is neither Plaintiff or Defendant is a person not a party to the lawsuit and his statement may be obtained under Rule 26.92 without a specific showing of substantial need.

Judge Stone's view is especially instructive, since he served as a member of the 1975 Advisory Committee that recommended this rule change, which deviated from the federal rule.

It should also be noted that section IV of the Minnesota Rules of Civil Procedure for the District Courts, entitled "Parties," provides meaningful guidance as to whether the corporate employees in this case should be considered parties. For example, Minn. R. Civ. P. 19.01 provides in part that "[a] *person* who is subject to service of process shall be joined as a *party* * * *." (Emphasis added.) Furthermore, Rule 19.02 is applicable when "[a] *person* * * * cannot be made a *party*." (Emphasis added.) These provisions make it clear that a "person" becomes a "party" when named in the action.

We will continue to follow the construction suggested by out prior cases. as more recently enunciated in *Larson v. Independent School District No. 315*, 305 Minn. 358, 362, 233 N.W.2d 744 ,747 (1975):

> [T]he Rules are to be liberally construed so as to serve the interests of justice and so as to discourage reliance on technicalities and form.

For the above reasons, we conclude that in the factual setting presented here corporate employes who are not named parties in the litigation are not "parties" within the meaning of Minn. R. Civ. P. 26.02(3).

2. In *Schmitt v. Emery*, 211 Minn. 547, 2 N.W.2d 413 (1942), this court held that employee statements taken by an employer's claims agent were protected by the attorney-client privilege. Soon after Minnesota decided *Schmitt v. Emery*, the United States Supreme Court decided *Hickman v. Taylor*, 329 U.S. 495 (1947). *Hickman* involved an accident in which a tugboat sank while towing a ferry. An attorney hired by the tugboat owner (a partnership) took the statement of the tugboat crew, who witnessed the accident. In an action against the company on behalf of an employee who drowned, the tugboat owners claimed the statements were protected by the attorney-client privilege and thereby refused to produce them. The court found that they were not privileged, stating:

> [T]he memoranda, statements and mental impressions in issue in this case fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis.[6]

Id. at 508.

Hickman, having been decided under the federal rule, is not controlling, but was significant in its impact upon

[6]We need not discuss the work-product rule of the *Hickman* case, since the Minnesota rule differs from the federal rule.

the adoption of the Minnesota Rules of Civil Procedure in 1952. Two works on Minnesota civil practice have concluded that Rule 26.02(3) embodies the *Hickman* decision.[8] Both the case at hand and *Hickman* portray the investigative scenario of an overwhelming percentage of personal injury litigation.

Since *Hickman*, several cases have considered the attorney-client privilege in the employer/employee setting. One of these cases is *Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483 (D.C. Pa. 1962). The *Westinghouse* court narrowed the issue to a determination of whether the employee was, at the time, seeking legal advice on behalf of the corporation. If not, employee statements are merely those of witnesses, and are not privileged. To determine whether the employee was seeking legal advice on behalf of the corporation, the court advanced the "control group" test. This test requires that the employee be in a position to control or take a substantial part in a decision about any action to be taken upon the advice of the attorney or that the employee be a member of a group having such authority. In the instant case, it is clear that the switching crew members are not within the "control group."

A second test, "the subject matter test," was advanced in *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam by an equally divided court*, 400 U.S. 348 (1971). In this case, plaintiff sought to discover statements prepared by defense attorneys while debriefing employees (or former employees) after they testified before a federal grand jury. The court held

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[8] *See* 11 P. Thompson, *Evidence* § 501.01 at 188 (1979) ("The *Hickman* decision is largely codified in Minn. R. Civ. P. 26.02.") 3 D. McFarland & W. Keppel, *Minnesota Civil Practice*, § 1506, at 19 (1979).

that an employee, though not a member of his employer's control group, could be sufficiently identified with his employer so that his communication to the corporation's attorney would be privileged. Such a connection exists where the employee made the communication at the direction of his supervisor and where the subject matter upon which the lawyers advice was sought by the corporation and dealt with in the communication was within the performance of the employee's duties. The court stated that it was—

> not dealing in this case with the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses; employees who, almost fortuitously, observe events which may generate liability on the part of the corporation. We express no opinion with respect to communications by employees who fall in that class.

Id. at 491.

Because the *"subject matter"* and the *"control group"* tests have been widely criticized,[7] a third test, the *"Weinstein test"* was adopted by the Eighth Circuit in *Diversified Industries v. Meredith, Inc.*, 572 F.2d 596 (1978). The court adopted the suggestion of Judge/Professor Weinstein that the attorney-client privilege should be available to a corporation if all the following requirements are satisfied:

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[7]The "control group" test is criticized as ignoring the realities of corporate life by applying the attorney-client privilege to statements of only the highest level of executives. *See* Note, *Privileged Communications Inroads on the "Control Group" Test in the Corporate Area*, 22 Syracuse L. Rev. 759, 767 (1971). On the other hand, the subject matter test is criticized as broadly protecting almost all employee communications. *See* Note, *Attorney-Client Privilege in Corporate Clients; The Control Group Test*, 84 Harv. L. Rev. 424, 432 (1970).

> (1) [T]he communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Id. at 609.

In deciding this case, certain conflicting policy considerations must be kept in mind. The purpose behind the attorney-client privilege is to promote open and honest discussion between clients and their attorneys. *National Texture Corp. v. Hymes*, 282 N.W.2d 890 (Minn. 1979). On the other hand, Minnesota favors a liberal construction of the discovery rules so as to uncover all relevant matters before trial, even those inadmissible at trial. *Anderson v. Florence*, 288 Minn. 351, 362. 181 N.W.2d 873, 879 (1970). As recognized in *Kahl v. Minnesota Wood Specialty, Inc.*, 277 N.W.2d 395 (Minn. 1977), the attorney-client privilege is a barrier to disclosure and tends to suppress relevant facts and, as such, must be strictly construed.

After reflecting on these policy factors and considering the three alternative tests, we reverse the trial court. Under any of these tests, the scope of the attorney-client privilege does not encompass communications about events which are within the employee's knowledge solely because he witnessed an accident.

We therefore hold that when an employee is merely a witness to an accident and not a party to a subsequent action, communications made with him in a general investigation do not create an attorney-client relationship. This result is consistent with *Hickman, supra,* and the three tests cited herein.[8] In so holding, we necessarily overrule *Schmitt v. Emery, supra.*

Reversed.

SIMONETT, Justice (concurring specially.)

The majority holds that, under Rule 26, "in the factual setting presented here," statements of corporate employees who are not named parties are freely discoverable on request. I concur in this result, and I join in part 2 of the court's opinion.

But it seems to me a different result may obtain under Rule 26 if the employee is, say, an owner of a small, closely held business or professional corporation or partnership, and the employee is not just a witness but a participant in conduct for which his corporation or partnership is vicariously liable. Rule 26 says a party is not entitled to another party's statement on request, but only

---

[8]Recently, in *Upjohn Co. v. United States,* 101 S.Ct. 677 (1981), the United States Supreme Court considered the scope of the attorney-client privilege in a corporate setting. In *Upjohn,* that corporation, through its general counsel, made an investigation of alleged illegal payments to foreign officials. As part of the investigation, Upjohn's general counsel interviewed and sent questionnaires to foreign managers. Through an administrative summons, the criminal investigation division of the Internal Revenue Service sought production of the completed questionnaires and the interview notes. Upjohn refused to produce them, arguing that the documents were both work product and protected by the attorney-client privillege.

After criticizing the "control group" test, yet without adopting the "subject matter" or another test, the Supreme Court held that the documents in question were protected by the attorney-client privilege.

Upjohn is critically different from the instant case in that the communications in *Upjohn* regarded a matter within the scope of the employees' duties. In the instant case the witnessing of an accident was not within the scope of the employees' duties.

after a required showing. To require such employee's statement to be surrendered on request if only his corporation is sued but not if he himself is sued would seem to give undue deference to the corporate veil.

PETERSON, Justice (concurring specially).

I join in the opinion of Justice Simonett.

OTIS, Justice (dissenting).

With respect to statements taken from those members of the switching crew whose negligence is alleged to have caused plaintiff's injuries, I cannot agree that their employer has no right to invoke the attorney-client privilege. As to them, the unanimous decision of the United States Supreme Court in *Upjohn Co. v. United States*, 101 S. Ct. 677 (1981) is clearly pertinent, and in my opinion, highly persuasive.

In *Upjohn*, the corporation found itself faced with the likelihood of a substantial tax liability arising out of the bribery of foreign officials by its employees abroad. This disclosure prompted the Chairman of the Upjohn Board of Directors to authorize the corporation's general counsel to make a thorough investigation. An essential, indeed critical, element of the inquiry was to elicit from the employees responsible for the alleged misconduct, information regarding their participation in the illegal payments.

Questionnaires went to all foregin managers and responses were sent derectly to general counsel. The Internal Revenue Service subpoenaed all Upjohn files relative to the investigation. Upjohn resisted on the grounds of the attorney-client privilege. The Supreme Court sustained that contention. The Court noted that:

> Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment,

> embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.
>
> * * * * *
>
> The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. As the magistrate found, "Mr. Thomas [general counsel] consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments *and to be in a position to give legal advice to the company with respect to the payments.*"
>
> * * * * *
>
> The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice.

Id. at 683, 685 (emphasis in original) (footnote omitted).

In the case before us, this was precisely the purpose of counsel's interviewing those whose activity may have given rise to the railroad's liability, i.e. to defend the company in anticipation of potential litigation. The Supreme Court went on to point out that:

> The privilege only protects disclosure of communications; it does not protect disclosure of the underly-

> ing facts by those who communicated with the attorney: "The protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."
>
> * * * * *
>
> Here the Government was free to question the employees who communicated with Thomas and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them.

Id. at 685-86 (quoting *City of Philadelphia v. Westinghouse Electric Corp.* 205 F.Supp. 830, 831 (E.D. Pa. 1962) (emphasis in original) (citations omitted).

The Chief Justice, expanding on the decision of the Court, would explicitly adopt this rule:

> [A] communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or

> would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct.

Id. at 680 (Burger, J., concurring).

I have difficulty distinguishing the principles set forth in *Upjohn* from those we have applied for almost 40 years since *Schmitt v. Emery*, 211 Minn. 547, 552, 2 N.W.2d at 413, 416 (1942). There we held:

> Because it is so often necessary for clients to communicate with their attorneys with the assistance or through the agency of others, as well as by their own personal action, the privilege extends to a communication prepared by an agent or employe, whether it is transmitted directly to the attorney by the client or his agent or employe. Of course the privilege is limited to the necessities of the situation. Where a document is prepared by an agent or employe by direction of the employer for the purpose of obtaining the advice of the attorney or for use in prospective or pending litigation, such document is in effect a communication between attorney and client. The client is entitled to the same privilege with respect to such a communication as one prepared by himself.

Consequently, I would adhere to precedent and affirm the trial court by answering the certified question in the affirmative insofar as employees who took part in the switching operation are concerned. I would agree that the role of employees not responsible for the activity out of

which the injury occurred are bystanders whose status would be quite different from the employees with which the *Upjohn* decision was dealing.

STATE OF MINNESOTA
Office of Clerk of Supreme Court

ST. PAUL, MINN.

WILLIAM E. LEER,

Appellant,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILWAY COMPANY,

Respondent.

August 14, 1981

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the peition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

JOHN McCARTHY
Clerk Supreme Court

STATE OF MINNESOTA
IN SUPREME COURT

WILLIAM LEER,

Appellant,

50915 and 81-905 vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILWAY COMPANY,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT HEREBY ORDERED that all proceedings in the district court be stayed for a period of 90 days to allow the defendant Chicago, Milwaukee, St. Paul & Pacific Railway Company to petition the United States District Court for a writ of certiorari. Thereafter, any applications for further stays should be directed to and filed in that court.

IT IS FURTHER ORDERED that the petition of the plaintiff William Leer for a writ of mandamus be, and the same is, hereby denied.

Dated: Oct. 9, 1981.

BY THE COURT:

/s/ DOUGLAS K. AMDAHL
Associate Justice

STATE OF MINNESOTA
County of Dakota

IN DISTRICT COURT
First Judicial District

WILLIAM E. LEER,

Plaintiff,

vs.

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILWAY COMPANY, a corporation,

Defendant.

ORDER

File #88452

The above-entitled matter came duly on for hearing before the undersigned judge of the said court in courtroom # 1 at the Dakota County Government Center on the 15th day of November, 1970 in the City of Hastings, Dakota County, Minnesota, on plaintiff's motion for production of certain statements given by employees of defendant herein relative to a cause of action plaintiff has against defendant under the Federal Employers Liability Act.

Plaintiff appeared through his attorney, J. Howard Hill, 730 2nd Ave. So. Suite 915, Mpls. Mn. 55402, in support of said motion. Defendant appeared by its attorney, Roger R. Roe, Jr., 900 1st National Bank Bldg. Mpls. Mn. 55402, in opposition thereto.

Based upon a review of the files and records contained herein, the arguments of counsel and memoranda, it is hereby ORDERED, that plaintiff's motion for production of statements of defendant's employees who plaintiff claims were negligent in bringing about plaintiff's injuries,

specifically the four crew members working with plaintiff at the time of his injury, is hereby denied.

Dated: December 28th, 1979.

BY THE COURT:

/s/ CHARLES F. GEGEN
Judge

Memo attached.

Memo: Leer vs. Chicago etc. Railway Co.

It appears to the Court that this motion concerns attorney-client privilege; the question being who is the client of an attorney who represents the corporation? It is the Court's opinion that a party whose actions give rise to liability on the part of a corporation or whose actions are relied on by a plaintiff as the basis for liability on behalf of the corporation, although not joined as parties to the suit, are more than mere witnesses, and, in effect are the clients of the attorney for the corporation in litigation such as involved in the instant case. To rule otherwise would in effect say that there is no attorney client privilege between a corporation and its attorneys. To limit said privilege to key officers of the corporation would, in most cases, be meaningless, as they normally are not performing functions of the corporation which give rise to liability in civil matters. To hold otherwise would, in effect say, that if an employee were driving a company vehicle owned by a corporation and were involved in an accident; went to the company's attorney and gave full statement of what happened, this statement would not fall within the attorney-client privilege and would be discoverable. This Court does not think that this is the state of the law. Although

plaintiff may be caused some hardship as a result of the Court's ruling, or at least some inconvenience, the traditional attorney-client privilege and the maintaining thereof is more important than the inconvenience cause in a single case. For these reasons the motion of plaintiff is denied.

CFG

Opposition

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CLERK

No. 81-881

IN THE

Supreme Court of the United States

October Term, 1981

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILWAY COMPANY,

Petitioner,

vs.

WILLIAM E. LEER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PRAYER FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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1982—Northwest Brief Printing Co., 3010 2nd St. No., Minneapolis 55411—588-7506

QUESTION PRESENTED

Should the United States Supreme Court grant Petitioner a Writ of Certiorari to review a Minnesota Supreme Court decision which merely construes and applies a state rule of discovery procedure?

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IN THE

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October Term, 1981

No. 81-881

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILWAY COMPANY,

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WILLIAM E. LEER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PRAYER FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

Respondent, WILLIAM E. LEER, respectfully prays that this Court deny Petitioner's request that a Writ of Certiorari issue to review the opinion and orders of the Minnesota Supreme Court filed July 17 and August 14, 1981, concerning *Leer v. Chicago, M., St. P. & P. Ry Co.*, Minn., 308 N.W.2d 305.

RESTATEMENT OF THE CASE

Respondent-Leer (hereafter Leer) adopts the Minnesota Supreme Court's recitation of the facts as stated at 308 N.W.2d 306, and at Pages A-3 and A-4 of Petitioner-railroad's (hereafter railroad) brief.

It should be noted the railroad, in its statement of the case, makes the following misstatement:

> Leer's Complaint alleges that the other members of the switch crew were negligent in the performance of their duties.
>
> Railroad's brief at p. 3.

Instead, the allegation reads as follows:

> [S]uch accident was caused by the defendant's negligence and failure to provide plaintiff with a reasonably safe place to work, failure to exercise reasonable care to provide plaintiff with a reasonably safe and efficient switch mechanism and by further reason of the defendant's negligence and carelessness by reason of its failure to exercise reasonable care in the execution of the switching movement then and there being carried out.

Leer has never claimed any particular employee was negligent. That is one reason Leer seeks discovery of the statements. Rather, he alleges the accident was caused by the railroad's negligence. The complaint states several alternative allegations of negligence, not all of which are conditioned upon culpable acts on the part of the employee-witnesses whose statements are sought.

The railroad also fails to mention its attorneys did not become involved in this case until nine months after the accident.

REASONS FOR DENYING THE WRIT

I.

THE UNITED STATES SUPREME COURT SHOULD DENY CERTIORARI SINCE NO SUBSTANTIAL FEDERAL QUESTION WAS RAISED IN THIS CASE. THE MINNESOTA SUPREME COURT BASED ITS DECISION ON A PARTICULAR FACT SITUATION PRESENTED TO CONSTRUE A STATE RULE OF CIVIL PROCEDURE.

A general statement that a state court decision denies the constitutional rights of the objecting party and violates the Fourteenth Amendment Equal Protection and Due Process clauses does not sufficiently raise a federal question (particularly where such objections appear for the first time on appeal) *Clarke v. McDade,* 165 U.S. 168, 17 S. Ct. 284 (1897).

The railroad's brief to the Minnesota Supreme Court argued two contentions: (1) the statements are statements of a "party" under Minn. R. Civ. P. 26.02(3), and hence are not discoverable by appellant as of right, and (2) the appeal should be dismissed for lack of appellate jurisdiction under Minn. R. Civ. App. P. 103.03(i). The Minnesota Supreme Court addressed those contentions and found both void of any merit.

The railroad's statement in its brief to this Court, viz. "[I]t is obvious that the trial judge's ruling was based on the Fourteenth Amendment" should be immediately recognized as a misdirected effort to bootstrap constitutional considerations into a record where none hitherto existed.

Leer respectfully prays that this Court deny the railroad's application for a Writ because no substantial federal question was raised.

II.

EVEN IF THIS COURT DETERMINES A SUBSTANTIAL FEDERAL QUESTION EXISTS, THE COURT SHOULD DENY CERTIORARI BECAUSE NO SUBSTANTIAL FEDERAL QUESTION WAS PROPERLY PRESENTED TO THE MINNESOTA SUPREME COURT. TITLE 28 U.S.C. §1257(3) STATES, IN PART, "FINAL JUDGMENTS RENDERED BY THE HIGHEST COURT OF A STATE MAY BE REVIEWED BY WRIT OF CERTIORARI WHERE ANY . . . RIGHT [OR] PRIVILEGE . . . IS *SPECIALLY SET UP OR CLAIMED* UNDER THE CONSTITUTION . . .". (Emphasis added)

It is essential to the jurisdiction of this Court in reviewing a decision of a state court that it must appear affirmatively *from the record* not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was *necessary* to the determination of the cause, and that it was actually decided. *Lynch v. People of New York*, 293 U.S. 52, 55 S. Ct. 16 (1934) (emphasis added).

As previously discussed, the railroad's two major contentions to the state court involved arguments that first, the employee-witnesses to the accident were "parties", and second, that the appeal should be dismissed on state jurisdictional grounds. In other words, the railroad failed to properly present a substantial federal question to the state supreme court.

The Minnesota Supreme Court did mention three "tests", applied by different federal courts. The railroad argued in its brief before the state court that the three tests "simply have nothing to do with any issue before this Court." The railroad concluded that engaging in an

analysis of the privilege under these "tests" is a pointless inquiry.

In its Petition for a Writ of Certiorari before this Court, the railroad does an abrupt about-face and argues "Courts Nationwide are Applying Inconsistent Standards [tests]." Before the state court the railroad argued the "tests" were not worth analyzing, and did not apply. Now the railroad contends that alleged inconsistencies of three federal courts' opinions constitutes a substantial federal question and justifies certiorari.

The state supreme court record is void of any proof that a substantial federal question was properly presented and was necessary to the determination of the cause, and therefore, Leer submits, the railroad's application for a Writ should be denied.

III.

EVEN IF THIS COURT DETERMINES A SUBSTANTIAL FEDERAL QUESTION EXISTS AND WAS PROPERLY PRESENTED TO THE MINNESOTA SUPREME COURT, THIS COURT SHOULD DENY CERTIORARI BECAUSE THE MINNESOTA SUPREME COURT RELIED ON INDEPENDENT AND ADEQUATE STATE GROUNDS. THE *LEER* DECISION MERELY GIVES MINNESOTA STATE COURTS GUIDANCE IN INTERPRETING A STATE PROCEDURAL RULE OF DISCOVERY.

The principle that the United States Supreme Court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions, is well established. *Henry vs. State of Mississippi*, 379 U.S. 443 (1965).

The key issue before the state supreme court in de-

termining whether the statements were discoverable under Minn. R. Civ. P. 26.02(3) was whether the employee-witnesses were parties to the action. The rule clearly states that non-party witness statements are discoverable. None of the four employee-witnesses who gave statements to the railroad are named parties to the action. Minnesota's Rule differs from the Federal Rule in that Minnesota permits parties to obtain statements made by non-party witnesses without a showing of substantial need.

Justice Scott wrote the opinion for the Minnesota Supreme Court, and stated, in part:

> *[I]n the factual setting presented here,* corporate employees who are not named parties in the litigation are not "parties" within the meaning of Minn. R. Civ. P. 26.02(3).
>
> *Leer* at 308 N.W. 2d 305 (Emphasis added).

In finding that the employee-witnesses were not parties, the state supreme court reaffirmed the state legislature's mandate advocating broad discovery. Minnesota's discovery rules are best interpreted and applied by Minnesota's state courts and legislature, just as the federal discovery rules are best interpreted and applied on a federal level.

Despite the railroad's misstatements to the contrary, the Minnesota Supreme Court in *Leer* did not fail to adopt an *"Upjohn* test". In *Upjohn v. United States,* 449 U.S. 383 (1981), Justice Rehnquist not only stated that this Court declines to lay down any broad rule, but wrote:

> Needless to say, we decide only the case before us, and do not undertake to draft a set of rules . . . ("the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis") . . . .
>
> *Upjohn* at 396.

The basis of the *Leer* decision rested upon "party vs. non-party" considerations. The Minnesota Supreme Court, while noting this Court's decision in *Upjohn*, merely applied a state rule of discovery procedure to a particular situation.

Leer respectfully submits the Minnesota Supreme Court's decision in *Leer* construes a state rule of civil procedure, and as such, rests on independent and adequate state grounds; therefore, the railroad's application for a Writ should be denied.

IV.

EVEN IF THIS COURT DETERMINES A SUBSTANTIAL FEDERAL QUESTION EXISTS, WAS PROPERLY PRESENTED TO THE STATE SUPREME COURT, AND THE STATE COURT'S DECISION DOES NOT REST ON INDEPENDENT AND ADEQUATE STATE GROUNDS, THIS COURT SHOULD DENY CERTIORARI BECAUSE THE CASE IS NOT JUSTICIABLE.

In *Aetna Life Insurance Company v. Haworth*, 300 U.S. 227 (1937), Chief Justice Hughes discusses justiciability:

> It must be a real and substantial controversy admitting of specific relief . . . as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

The facts contained in the record do not present a justiciable question to this Court. There is no evidence that the employee-witnesses ever sought the advice of the railroad's attorneys, particularly in the nine-month interval between the date of the accident and the filing of the complaint.

During oral argument before the Minnesota Supreme Court one of the justices questioned counsel for the railroad as to why the record lacked any evidence of the nature and extent of any purported attorney involvement in the taking of the statements. The factual record is void of any evidence substantiating a claimed attorney-client privilege. The record is ambiguous as to whether or not any or all of the witnesses were merely observers of an occurrence or culpable participants in the claimed negligence.

The railroad asks this Court to make a decision on the subject of attorney-client privilege in a corporate setting without providing facts necessary to allow this Court to make an informed decision. Therefore, Leer submits this case is not justiciable and the Petition for a Writ should be denied.

CONCLUSION

A careful examination of the railroad's brief reveals nothing more than a final and desperate attempt at fabricating a constitutional issue out of a state supreme court decision construing a state discovery rule. The railroad failed to properly present any substantial federal questions to the state supreme court. That Court's decision rests upon independent and adequate state grounds. The railroad's failure to present minimum and necessary facts and evidence in the record to the Minnesota trial and appellate courts on issues now presented here, coupled with unanswered questions and undeveloped facts in this action make this case inappropriate for review by this

Court. Leer respectfully prays the railroad's petition be denied in whole.

Respectfully submitted,

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Petitioner's Reply Brief

Office - Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1981

No. 81-881

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILWAY COMPANY,

Petitioner,

vs.

WILLIAM E. LEER,

Respondent.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PRAYER FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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1982—Northwest Brief Printing Co., 3010 2nd St. No., Minneapolis 55411—588-7506

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IN THE

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No. 81-881

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILWAY COMPANY,

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PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PRAYER FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

INTRODUCTION

Petitioner, Chicago, Milwaukee, St. Paul and Pacific Railway Company, is compelled to submit a brief in reply to Respondent's Brief in Opposition to Petitioner's Prayer for a Writ of Certiorari to the Minnesota Supreme Court. Two glaring misrepresentations in petitioner's Brief are examined below.

ARGUMENT

A. RESPONDENT ERRONEOUSLY INDICATES THAT THE RAILWAY'S COUNSEL DID NOT BECOME INVOLVED IN THIS CASE UNTIL NINE MONTHS AFTER THE ACCIDENT.

Respondent erroneously states that the Railroad's "attorneys did not become involved in this case until nine months after the accident." Respondent's Brief in Opposition to Petitioner's Prayer for a Writ of Certiorari to the Minnesota Supreme Court at 2. Respondent cites no portion of the record that supports this bald assertion. During oral argument before the Minnesota Supreme Court, petitioner's counsel specifically advised the court that he was retained by the Railroad to advise its claim staff regarding how to proceed in this matter almost immediately, and believed to be within 24 hours after the accident.

The record is silent cnncerning when respondent's counsel was retained, because the work-product doctrine was never considered by the trial court or Minnesota Supreme Court. The term "work product" is not even mentioned in the Minnesota Supreme Court's decision in *Leer v. Chicago, Milwaukee, St. Paul, & Pacific Railway*, 308 N.W.2d 305 (1981). The work product doctrine also is not an issue before this Court. Respondent's statement concerning when the Railroad's counsel was retained, is not only wrong, it improperly interjects on appeal an issue never previously raised.

B. RESPONDENT ERRONEOUSLY INDICATES THAT THE NEGLIGENCE OF THE RAILROAD'S EMPLOYEES IS NOT MATERIAL TO THIS LAWSUIT.

Respondent erroneously indicates that he "has never claimed any particular [Railroad] employee was negligent. . . ." Respondent's Brief in Opposition to Petitioner's Prayer for a Writ of Certiorari to the Minnesota Supreme Court at 2. Respondent would have this court believe that the negligence of any Railroad employee is not material to this lawsuit. This is nonsense. It is undisputed that the four Railroad employees working with respondent at the time of the accident were active participants in the train switch movement in question. The trial court ordered that the employees' statements were privileged because it was their "actions [that] give rise to liability on the part of" the Railroad.[1] See Appendix to Petition for a Writ of Certiorari to the Minnesota Supreme Court at A-19. The plaintiff's cause of action against the Railroad is based on the negligent conduct of his co-employees. The four employees working with respondent at the time of the accident were not mere bystanders; they allegedly caused the accident. If the Railroad has any liability, it is due, and only due, to the fact that these particular employees were negligent and their negligence is imputed vicariously to their corporate employer. As in *Upjohn Co. v. United States*, 101 S. Ct. 677, 683 (1981) the employees whose statements are sought "can by actions within the scope of their employment embroil the corporation in serious legal difficulties." Because the Railroad's

[1]The Minnesota Supreme Court either misread or ignored the record when it stated that the Railroad employees merely witnessed the accident. 308 N.W.2d at 309.

employees' conduct if wrongful, may be imputed vicariously to their employer, the negligence of the employees engaged in the switching movement is not only material to this lawsuit, it is dispositive concerning the Railroad's liability.

CONCLUSION

The Minnesota Supreme Court's ruling in *Leer v. Chicago, Milwaukee, St. Paul and Pacific Railway*, abrogating a corporation's rights to assert the attorney-client privilege, violates the equal protection and due process provisions of the United States Constitution. The constitutional issues addressed in the Railroad's Petition for a Writ of Certiorari to the Minnesota Supreme Court were properly raised in the courts below. Accordingly, a Petition for a Writ of Certiorari to the Minnesota Supreme Court should issue in this matter.

Respectfully submitted,

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